

SERVED: August 5, 1999

NTSB Order No. EA-4784

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 28th day of July, 1999

_____	)	
JANE F. GARVEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-15132
v.	)	
	)	
LEWIS P. BJORK	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty, issued on March 13, 1998, at the conclusion of an evidentiary hearing.<sup>1</sup> In that decision, the law judge found that respondent had performed aerobatic maneuvers over runway 16/34 at Salt Lake City No. 2 Airport, on September 5, 1997, in violation of Federal Aviation

---

<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

Regulations (FAR) sections 91.303(d), 91.303(e), 91.119(b), and 91.13(a), 14 CFR Part 91.<sup>2</sup> Since these findings encompass only a part of the Administrator's order, the law judge reduced the sanction from a 90-day to a 40-day suspension of respondent's airline transport pilot (ATP) certificate. The Administrator has not appealed the reduction in sanction.

Respondent is a commercial pilot, who also performs in air shows. On the evening in question, he was rehearsing for a performance that was scheduled the next day at Carbon County Airport. According to respondent, his performance involved a

---

<sup>2</sup>FAR sections 91.303, 91.119, and 91.13 provide, in pertinent part, as follows:

**§ 91.303 Aerobatic flight.**

No person may operate an aircraft in aerobatic flight....

(d) Within 4 nautical miles of the center line of any Federal airway;

(e) Below an altitude of 1,500 feet above the surface....

For purposes of this section, aerobatic flight means an intentional maneuver involving an abrupt change in an aircraft's attitude, an abnormal attitude, or abnormal acceleration, not necessary for normal flight.

**§ 91.119 Minimum safe altitudes: General.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes....

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft....

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another....

skit with individuals dressed like clowns, pretending to control respondent's aircraft from the ground. This particular rehearsal was to practice their timing, so it would appear that the clowns were operating respondent's aircraft by remote control.

Respondent claims that he had already practiced the execution of his maneuvers earlier that day, in an authorized location, and that he had no intent to perform aerobatics in this rehearsal. The other individuals involved testified that respondent had told them beforehand that he could not perform aerobatics; instead, they claim, he planned to "rock the wings" of his aircraft to signify when an aerobatic maneuver would occur during the actual performance.

At the time of this rehearsal, a unit of the Utah Army National Guard was drilling at Salt Lake Airport No. 2. Some of the unit members were on the Guard ramp, performing a pre-flight aircraft inspection. They were apparently alarmed when they observed respondent's maneuvers, and they brought it to the attention of Chief Warrant Officer (CW4) Higgins, their instructor pilot, who is also an FAA Inspector.

According to Inspector Higgins, he observed respondent's aircraft make several passes over or near the center line of the active runway. (TR-63). He observed respondent make a steep bank, a reverse course procedure along the runway, and then a 90-degree bank angle in one direction. Respondent then brought the wings of the aircraft to a horizontal position, and performed a 90-degree bank in the other direction. Respondent then made

another course reversal, descended low and made a low pass down the runway in the other direction. He continued to the north, making another course reversal, descended, and made a low pass down the runway. (TR-14). In Mr. Higgins' estimation, the course reversals were made at banks exceeding 60 degrees, and he saw at least one 90-degree bank angle. (TR-24). Moreover, Mr. Higgins testified, respondent's aircraft deviated from the standard traffic pattern, because only left turns are authorized to Runway 34, and because respondent operated his aircraft against the traffic. (TR-82). Mr. Higgins testified that he saw respondent fly the aircraft above 700 feet, placing it within 4 miles of a federal airway. (TR-55). In Mr. Higgins' opinion, respondent's operation was reckless, because Salt Lake Airport No. 2 is a very busy airport.

Derrick Wade was one of the Guard pilots who also saw respondent's operation. Mr. Wade testified that he observed at least 6 passes. He described seeing a "tear drop" kind of maneuver on the south end of the runway, as respondent turned to come back north. He opined that respondent's angle of bank was 65 to 70 degrees, explaining that he could see most of the wing span. He saw the aircraft operate as low as 50 feet, and as high as 500 feet.

Respondent denies that he performed aerobatic maneuvers. He insists that he only "rocked the wings" of his aircraft, and that his bank angles never exceeded 60 degrees, except, "possibly," once. (TR-149). He admits that his aircraft did not have a

gyroscope.<sup>3</sup> According to respondent, his entire flight was below 1,500 feet AGL and not within the federal airway, though he again conceded that his third turn may have been "close" to 700 feet AGL. Respondent testified that he intended to comply with the regulations.

Respondent's father, also a pilot, testified that respondent's bank angles were less than 60 degrees. David Oakeson, a member of respondent's crew and a pilot, testified that, in his opinion, respondent's bank angles were between 45 and 60 degrees. Kathleen Neilson, also a member of the crew, opined that, respondent tipped his wings at 45 to 50 degree angles. Oakeson is related to respondent. Neilson is a friend.

A number of the issues raised by respondent in this appeal relate to amendments made to the original order, which was issued on December 22, 1997. In the original order, the Administrator alleged violations of FAR Sections 91.303(d), 91.303(e), and 91.209(a). On February 4, 1998, the Administrator added allegations of violations of FAR Sections 91.119(b), 91.119(c), and 91.13, as well as additional factual allegations in support of these new charges. On February 26, 1998, the law judge dismissed, on respondent's motion, certain of the new factual allegations. At the conclusion of the hearing the law judge found respondent had violated FAR Sections 91.303(d), 91.303(e), 91.119(b), and 91.13(a), but not Sections 91.209(a) and 91.119(c). In the Administrator's reply brief, she now withdraws

---

<sup>3</sup>The aircraft was also not equipped with a radio.

the allegations of FAR Sections 91.119(b) and 91.13, and the underlying factual allegations. (Reply Brief at 7.) The only allegations that remain before the Board concern violations of Sections 91.303(d) and 91.303(e), both of which were originally pled. Thus, respondent's arguments concerning the Amended Complaint need not be addressed, since they have been rendered moot by the Administrator's post-hearing actions.<sup>4</sup> The remaining issues raised by respondent concern the meaning of "aerobatic maneuvers" in FAR Section 91.303, and the availability of the Aviation Safety Reporting System (ASRP) waiver to respondent, who filed a timely report of this incident to NASA.

As the law judge notes in his decision, a part of his determination was based on his finding the Administrator's witnesses more credible than respondent and his witnesses. The law judge saw and heard the witnesses, and we defer to his judgment of their demeanor. Further, respondent offers us no valid reason to disturb those findings. We also note that the law judge's findings were based on a number of admissions made by respondent which respondent now seems to ignore: he admits he performed bank angles of 60 degrees, and that he may have

---

<sup>4</sup>The Amended Complaint additionally alleged that the aerobatic maneuvers already charged were intentional, and that the unnecessary and abnormal changes to the aircraft's attitude, also already charged, involved latitudinal (bank) attitudes and exceeded a bank of 60 degrees relative to the horizon. In the Board's view, these changes only clarified the existing charges, and there was no error in permitting the amendment to the complaint.

exceeded 60 degrees at least once;<sup>5</sup> he admits the maneuvers were performed below 1,000 feet AGL; and he admits that his third turn may have been close to 700 feet AGL. Respondent has never denied that he performed the entire routine **against** the traffic pattern, on the **active** runway of a busy airport.

In the Board's view, the evidence amply establishes that respondent's maneuvers were aerobatic. While we recognize that there have been cases where, in other contexts, the lack of a specific definition of aerobatics has caused us concern, see Administrator v. Chandler, NTSB Order No. 4717 (1998), that is not the case here. Respondent recognizes in his appeal brief that a pilot must apply a reasonableness standard in determining what maneuvers would have been permissible. We do not believe respondent's determination here was reasonable. A bank angle of 60 degrees is excessive. It is not a mere "rocking of the wings." Board precedent has established that 60-degree bank angles are aerobatic. See, e.g., Administrator v. Lynch, 3 NTSB 3442 (1981)(55 to 60 degrees); Administrator v. Willison, 2 NTSB 1131 (1974)(60 degrees). Nor is this regulation so vague that respondent can persuade us he did not know his abrupt maneuvers were not prohibited as unnecessary for normal flight. Administrator v. Couch, NTSB Order No. EA-3655 (1992).

Finally, we agree with the Administrator that respondent's actions do not fall within the parameters of the ASRP. In our

---

<sup>5</sup>Respondent testified that, in his opinion, a 70-degree roll would have been permissible.

view, the deliberate performance of aerobatic maneuvers on the active runway of a busy airport, against the traffic pattern, and at impermissible altitudes, was reckless. Administrator v. Halbert, NTSB Order No. 3628 at 8 (1992). We have reviewed the sanction assessed by the law judge, and we do not believe that a further reduction is warranted, notwithstanding the Administrator's withdrawal of additional charges.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the law judge and as modified subsequent to the law judge's initial decision and order, is affirmed; and
3. The 40-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>6</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

---

(..continued)

<sup>6</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).